

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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RICK MCLELLAN,

Plaintiff,

v.

CHRIS PERRY, in his individual capacity;
and in his official capacity as Director of
the Department of Public Safety; JAROLD
HAFEN, in his individual capacity; TONY
ALMARAZ,

Defendants.

Case No. 3:12-cv-00391-MMD-WGC

ORDER

(Def.'s Motion for Summary Judgment –
dkt. no. 44)

I. SUMMARY

Before the Court is Defendants Chris Perry, Jarold Hafen, and Tony Almaraz's Motion for Summary Judgment. (Dkt. no. 44.) For the reasons discussed below, the motion is granted.

II. BACKGROUND

This is a § 1983 case arising from the termination of Plaintiff Rick McLellan's ("McLellan") employment with the Nevada Highway Patrol ("NHP"). McLellan was employed as a Trooper II with the NHP. During all relevant times McLellan was also the President of the Nevada Department of Public Safety Officer's Association ("NDPSA"). Defendant Tony Almaraz, Chief of the NHP, terminated McLellan's employment for false statements McLellan made in a dispute resolution meeting and then repeated in

1 subsequent meetings, including an official investigation conducted by the Office of
2 Professional Responsibility ("OPR"). Defendants Chris Perry and Jarold Hafen sustained
3 Almaraz's decision to terminate McLellan's employment.

4 Following his termination, McLellan filed a whistleblower complaint and pursued
5 an administrative appeal of his termination. At his post-termination hearing, McLellan
6 argued that the false statements were made in his capacity as NDPSA President and the
7 investigation opened into those statements — in which McLellan subsequently repeated
8 false statements — was in retaliation for McLellan's allegations of improper conduct
9 made against his superior officer. The Hearing Officer determined that McLellan's
10 whistleblower complaint had no merit and that although McLellan may have been acting
11 in the capacity of NDPSA's President at the time of the original false statements and its
12 first repetition, he was acting in the capacity of an employee at the time he repeated the
13 false statements to the OPR investigators.

14 McLellan had an opportunity to appeal the Hearing Officer's decision to state
15 district court under NRS 233B.135, but instead filed this action under 42 U.S.C. § 1983.
16 McLellan alleges that his termination violated his First Amendment free speech rights.
17 Defendants now move for summary judgment.

18 **III. DISCUSSION**

19 **A. Legal Standard**

20 The purpose of summary judgment is to avoid unnecessary trials when there is no
21 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
22 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the pleadings,
23 depositions, answers to interrogatories, and admissions on file, together with the
24 affidavits, if any, show there is no genuine issue as to any material fact and that the
25 movant is entitled to judgment as a matter of law." See *Celotex Corp. v. Catrett*, 477 U.S.
26 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if there is a sufficient
27 evidentiary basis on which a reasonable fact-finder could find for the nonmoving party
28 and a dispute is "material" if it could affect the outcome of the suit under the governing

1 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Where reasonable
2 minds could differ on the material facts at issue, however, summary judgment is not
3 appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). In evaluating a
4 summary judgment motion, a court views all facts and draws all inferences in the light
5 most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*,
6 793 F.2d 1100, 1103 (9th Cir. 1986). “Credibility determinations, the weighing of the
7 evidence, and the drawing of legitimate inferences from the facts are jury functions, not
8 those of a judge” *Anderson*, 477 U.S. at 255.

9 The moving party bears the burden of informing the court of the basis for its
10 motion, together with evidence demonstrating the absence of any genuine issue of
11 material fact. *Celotex*, 477 U.S. at 323. Once the moving party satisfies Rule 56’s
12 requirements, the burden shifts to the party resisting the motion to “set forth specific
13 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The
14 nonmoving party “may not rely on denials in the pleadings but must produce specific
15 evidence, through affidavits or admissible discovery material, to show that the dispute
16 exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do
17 more than simply show that there is some metaphysical doubt as to the material facts.”
18 *Bank of Am. v. Orr*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The
19 mere existence of a scintilla of evidence in support of the plaintiff’s position will be
20 insufficient.” *Anderson*, 477 U.S. at 252. Although the parties may submit evidence in an
21 inadmissible form, the Court may only consider evidence which might be admissible at
22 trial in ruling on a motion for summary judgment. Fed. R. Civ. P. 56(c).

23 **B. Analysis**

24 Defendants argue that they are entitled to judgment as a matter of law for three
25 reasons. First, Defendants assert that McLellan’s claims are precluded by the adverse
26 determination of the Hearing Officer and McLellan’s failure to appeal that decision to the
27 state court. Second, Defendants argue that McLellan cannot show his termination
28 deprived him of his First Amendment rights. Finally, Defendants aver that their actions

1 are covered by qualified immunity. The Court agrees that McLellan's claims are
2 precluded, and consequently, does not reach Defendants' other arguments.

3 **a. McLellan's Claims are Precluded by the Agency Action.**

4 Under 28 U.S.C. § 1738, federal courts give the same preclusive effect to state
5 court decisions as those decisions would be given in the state in which they were
6 rendered. *Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).
7 Additionally, "[a]s a matter of federal common law, federal courts give preclusive effect to
8 the findings of state administrative tribunals in subsequent actions under § 1983." *Miller*
9 *v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994) (citing *Univ. of Tenn. v.*
10 *Elliot*, 478 U.S. 788, 797-99 (1986)). These federal common law rules "extend to state
11 administrative adjudications of legal as well as factual issues, even if unreviewed, so
12 long as the state proceeding satisfies the requirements of fairness outlined in [*United*
13 *States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)]." *Guild Wineries*
14 *and Distilleries v. Whitehall Co., Ltd.*, 853 F.2d 755, 758 (9th Cir. 1988).

15 Accordingly, in determining whether a state agency decision has a preclusive
16 effect in federal court, "[t]he threshold inquiry . . . is whether the state administrative
17 proceeding was conducted with sufficient safeguards to be equated with a state court
18 judgment." *Miller*, 39 F.3d at 1033. At a minimum, the agency decision must "meet[] the
19 state's own criteria necessary to require a court of that state to give preclusive effect to
20 the state agency's decision[]." *Id.* Further, the state agency must have acted "within a
21 judicial capacity and resolved disputed issues of fact properly before it," and the parties
22 must have had an adequate opportunity to litigate the issues. *Utah Construction*, 384
23 U.S. at 422. In assessing the adequacy of the state agency's safeguards, courts have
24 considered a party's ability to present evidence and oral argument, subpoena, call, or
25 cross-examine witnesses, be represented by counsel, and seek judicial review of the
26 decision. See *North Pacifica, LLC v. City of Pacifica*, 366 F. Supp. 2d 927, 932 (N.D.
27 Cal. 2005); *Embury v. King*, 191 F. Supp. 2d 1071, 1083-84 (N.D. Cal. 2001). Where
28 procedural safeguards are sufficient, "federal courts must give the state agency's fact-

1 finding and legal determinations the same preclusive effect to which it would be entitled
2 to in that state's courts." *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999).

3 Under Nevada law, agency determinations are entitled to preclusive effect
4 provided all the elements of *res judicata* are met. *Britton v. City of North Las Vegas*, 799
5 P.2d 568, 569-70 (Nev. 1990). Those elements are: "(1) whether the issue decided in
6 the prior adjudication was identical to the issue presented in the action in question; (2)
7 whether there was a final judgment on the merits; and (3) whether the party against
8 whom the judgment is asserted was a party, or in privity with a party[,] to the prior
9 adjudication." *Id.* at 570.¹ Issues are identical when "the facts essential to the
10 maintenance of both suits are identical." *Round Hill Gen. Improvement Dist. v. B-Neva,*
11 *Inc.*, 606 P.2d 176, 178 (Nev. 1980).

12 The Court finds that the *res judicata* elements are satisfied in this case. First, the
13 issue presented in this litigation — whether McLellan was fired for dishonest statements
14 he made in his capacity as president of the NDPSA — was the same issue decided by
15 the Hearing Officer in the administrative proceeding. Even though McLellan's § 1983
16 claim is framed in constitutional terms, the facts essential to the maintenance of the
17 claim are identical to those underlying McLellan's administrative case. Second, the
18 Hearing Officer issued a final written decision on the merits of McLellan's claim. Third,
19 McLellan was a party to the administrative action and is presently the party against
20 whom that judgment is asserted. Thus, the Hearing Officer's decision would be given a
21 preclusive effect by a Nevada court.

22 Additionally, the Court finds the requirements of *Utah Construction* are satisfied.
23 First, the Nevada Department of Public Safety was acting in a judicial capacity when it

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25 ¹The Nevada Supreme Court has left open the question of whether certain public
26 policy considerations — such as employment discrimination — would eliminate an agency
27 decision's preclusive effect, see *id.* at 569. However, wrongful termination
28 determinations, where there are no allegations of discrimination (as that term is
commonly used in Title VII litigation) do not fall within that potential public policy
exception. *Roberts v. Las Vegas Valley Water Dist.*, 849 F. Supp. 1393, 1399 (D. Nev.
1994).

1 dismissed McLellan's whistleblower claims and upheld his termination. Second, the
2 circumstances surrounding, and the reasons for, McLellan's termination were properly
3 before the Hearing Officer. Finally, both parties had a full and fair opportunity to argue
4 their version of the facts. The record supports that the parties were represented by
5 counsel, called witnesses, presented documentary evidence, and submitted written
6 closing arguments. (Dkt. no. 49, Ex. 10.) The Hearing Officer issued written findings and
7 conclusions based on competent and relevant evidence introduced at the hearing, and
8 McLellan had a right to judicial review of the Hearing Officer's decision. (*Id.*) Thus, the
9 state administrative proceeding was conducted with sufficient procedural safeguards to
10 equate it with state court judgment, and this Court must give it preclusive effect.

11 McLellan presents two main arguments opposing preclusion. First, citing
12 *Strickland v. City of Albuquerque*, 130 F.3d 1408, 1413 (10th Cir. 1997), McLellan
13 argues that a preclusive effect should only be applied to a state court's affirmation of the
14 agency decision as an agency has no jurisdiction over a § 1983 claim. In *Strickland*, the
15 Tenth Circuit held that a state court's review of an agency decision precluded a plaintiff's
16 § 1983 claim, which he subsequently brought in federal court, because the § 1983 claim
17 could have been raised in the state court proceedings. *Id.* The Tenth Circuit then went
18 on to state that the "[p]laintiff had a choice of pursuing these claims in state court, where
19 the court could exercise conquering jurisdiction over the § 1983 claims, or in federal
20 court, where the court could exercise supplemental jurisdiction over the state law claims.
21 Once the plaintiff chose to seek judicial relief in state court, the interest of the City and of
22 society in bringing litigation to a close weighed heavily in favor of requiring him to assert
23 all available claims relating to his termination in a single action." *Id.* Based on this
24 statement, McLellan argues that because he chose to forego an appeal to the state
25 court, no adjudicatory body has or could have exercised jurisdiction over his § 1983
26 claim, and consequently, the claim is not barred by *res judicata*.

27 The main holding of *Strickland* — that preclusion cannot be obfuscated by simply
28 choosing not to raise a § 1983 claim in state court proceedings — is uncontroversial, and

1 similar holdings are found within the Ninth Circuit. See, e.g., *Holcombe v. Hosmer*, 477
2 F.3d 1094, 1097 (9th Cir. 2007). However, the rule McLellan extrapolates from the case
3 directly contradicts Ninth Circuit precedent. See, e.g., *Miller*, 39 F.3d at 1033 (finding
4 that the state agency's adverse decision barred a § 1983 action in federal court even
5 where the former employee failed to seek judicial review of the agency's decision in state
6 court).

7 Moreover, McLellan's argument is based on a misunderstanding of the facts and
8 claims in *Strickland*. In *Strickland*, the plaintiff, a state employee, was terminated for
9 failing a drug test. 130 F.3d at 1409. At the post-termination hearing, the plaintiff argued
10 that the agency had not complied with its own policies and procedures in administering
11 the test, the test yielded a false positive, and consequently, the state lacked just cause
12 for termination. *Id.* at 1410. However, the plaintiff's § 1983 claim was based on a
13 violation of his Fourth Amendment rights to be free from unlawful search and seizure by
14 administration of a drug test without reasonable suspicion. *Id.* Therefore, although
15 factually related, the plaintiff's § 1983 claim was based on an independent right and
16 distinct facts were necessary to its maintenance. In other words, even if the agency's
17 actions comported with its own policies and procedures, the test was accurate, and the
18 agency had just cause to terminate the plaintiff, administering the test may nonetheless
19 have violated the plaintiff's Fourth Amendment rights. In this manner, the *Strickland*
20 plaintiff's § 1983 claim was independent of his wrongful termination contentions. The
21 claim would not have been precluded by the agency determination as it was truly a
22 separate claim that had not been litigated before the agency. Thus, the plaintiff had the
23 choice to combine the separate, constitutional claim with his appeal of the agency
24 termination proceedings or to bring the claim in federal court as a true collateral attack of
25 the agency decision. However, having chosen to pursue the appeal in state court where
26 the § 1983 claim could have been raised, plaintiff was precluded from subsequent
27 litigation of that claim in federal court. See *id.* at 1413.

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1 Contrarily, in *Miller*, the plaintiff's § 1983 claim was simply a restatement of his
2 wrongful termination contentions in constitutional terms. 39 F.3d at 1034. Although
3 technically a different cause of action, the *Miller* court determined that the plaintiff's
4 wrongful termination claim and § 1983 claim were the same because both were based
5 on the primary right of continued employment. *Id.* at 1034-35. Although the plaintiff had
6 not sought review of the administrative decision in state court, the Ninth Circuit
7 concluded that the agency determination would be given preclusive effect in state court,
8 and the claim was therefore barred from being re-litigated in federal court. *Id.*

9 Similarly, in *Olson*, the Ninth Circuit rejected the argument that a § 1983 claim for
10 infringement on free exercise rights was different from a state administrative claim
11 seeking reinstatement of a professional license. 188 F.3d at 1085-86. In *Olson*, the
12 state board of psychological examiners revoked the license of a psychologist who
13 performed an exorcism on a client. *Id.* at 1085. Despite the fact that the plaintiff-
14 psychologist did not seek review of the board's decision claim in state court, the Ninth
15 Circuit reasoned that the plaintiff's § 1983 claim was barred because the agency
16 determination was a final decision and entitled to claim preclusion by state courts. *Id.* at
17 1086-87. Thus, where a § 1983 claim is simply a restatement of an administrative claim
18 couched in constitutional terms that has been adequately litigated at the agency level,
19 the claim is precluded from further litigation in federal court. *See id.*

20 Consequently, McLellan's contention that the unreviewed determination of the
21 Hearing Officer cannot have a preclusive effect is contrary to established law. Like *Miller*
22 and *Olson*, McLellan's § 1983 claim is simply his administrative claim framed in
23 constitutional terms as both claims are based on the same primary right to continued
24 employment and identical facts underpin their maintenance. Consequently, the claim
25 was litigated at the agency and became final when McLellan chose not to appeal to the
26 state district court. Because Nevada courts would give the Hearing Officer's decision
27 preclusive effect, this Court must do the same.

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1 Second, McLellan argues that the administrative proceedings did not provide an
2 adequate opportunity to litigate the matter because the Hearing Officer's decision was
3 based on a substantial evidence standard of review, but a § 1983 claim in federal court
4 would require a preponderance of evidence standard. *Citing Dias v. Elique*, 436 F.3d
5 1125, 1129 (9th Cir. 2006), McLellan argues that the shifting burden of persuasion
6 between the administrative hearing and the federal standard defeats preclusion of his
7 claim.²

8 However, McLellan misinterprets *Dias*. In *Dias*, two university police officers were
9 terminated for falsifying their time sheets. *Id.* at 1127. Under a substantial evidence
10 standard, a hearing officer determined that the officers entered false times on their time
11 sheets, and there was no evidence of retaliation or disparate treatment. *Id.* at 1128. The
12 federal district court then held that those *issues* were precluded, and granted summary
13 judgment in favor of the university on some of the officers' claims including those for
14 intentional infliction of emotional distress, negligence, negligent supervision, and
15 retaliation. *Id.* The remaining claims were dismissed under a theory of qualified
16 immunity. *Id.* The Ninth Circuit reversed the preclusion determination because, under an
17 *issue preclusion* analysis, litigation of facts at a lower burden of persuasion cannot
18 establish those same facts in the subsequent litigation of different claims subject to a
19 higher burden. *See id.* at 1129-30.

20 In doing so, the Ninth Circuit expressly noted that although issue preclusion can
21 be defeated by shifting burdens, *claim preclusion* is not subject to the same defense. *Id.*
22 at 1129. Rather, "[c]laim preclusion is not affected by shifts or changes in the burden of
23 persuasion so long as successive proceedings in fact involve the same claim." 18
24 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure

25
26 ²McLellan also argues that under *McDonald v. City of West Branch, Michigan*,
27 466 U.S. 284, 1801-03 (1984), determinations of "just cause" are not entitled to a
28 preclusive effect. However, *McDonald* is inapplicable as the Supreme Court was
 discussing the decisions of arbitrators whose decisions are not subject to the full faith
 and credit congressional mandate of § 1738. *See id.* at 1801.


1 § 4422 n.1 (2d ed. 2002). Unlike *Dias*, Defendants do not argue for issue preclusion, i.e.
2 that facts of a separate claim are established by the Hearing Officer's decision. Rather,
3 Defendants argue for claim preclusion, i.e. that McLellan's claim was litigated before the
4 Hearing Officer, and the Hearing Officer's decision bars re-litigation of that same claim.
5 Thus, *Dias* is inapplicable to the facts here.

6 Accordingly, having determined that a Nevada court would give preclusive effect
7 to the Hearing Officer's decision, McLellan's § 1983 claim is barred, and summary
8 judgment must be granted.

9 **IV. CONCLUSION**

10 It is therefore ordered that Defendants Chris Perry, Jarold Hafen, and Tony
11 Almaraz's Motion for Summary Judgment (dkt. no. 44.) is granted. The Clerk of the Court
12 is instructed to enter judgment in favor of Defendants and to close the case.

13 DATED THIS 27th day of March 2014.

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16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
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